



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 57 OF 2018

DAVID NYAGA.....APPELLANT/APPLICANT

VERSUS

SAMUEL KITHINJI.....RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the applicant's application dated 18th January 2019 seeking for orders for stay of execution in regard to the decree in CMCC No. 6 of 2013.
2. In a rejoinder vide an affidavit deposed on the 8th March 2019, the respondent opposes the application on the grounds that it lacks merit and does not meet the threshold for granting orders of stay of execution.
3. The parties disposed of the appeal by way of written submissions.

B. Applicant's Submissions

4. It is the applicant's submission that having lodged his appeal it is common practice that the court ought to grant a stay of execution over the decree appealed against until the appeal is determined.
5. The applicant further submits that the respondent in his replying affidavit raises issues that ought to be addressed in the substantive appeal. He further submits that the proposal by the respondent that he deposits security in court if granted, would amount to a pre-determination of his appeal and as such it ought to be disregarded.

C. Respondent's Case

6. The respondent submits that the applicant has not demonstrated that he will suffer any loss or prejudice if execution is not stayed. He relies on the case of **Masisi Mwita v Damaris Wanjiku Njeru HCCA No. 107 of 2015** in which the court held that the applicant had failed to prove that in the event that the appeal is allowed, the respondent was a man of no means who would not be in a position to pay.
7. He further submitted that the applicant has failed to meet the conditions precedent for grant for an order for stay as was held in the case of **Elena D. Korir v Kenyatta University (2012) eKLR** and the Court of Appeal in **Halal & Another v Thornton & Turpin Ltd (1993) KLR 365**. The conditions the foregoing cases were listed as substantial loss ensuing upon failure to grant stay orders; the applicant furnishing security and the application being made without unreasonable delay.
8. The respondent further submitted that the appeal did not raise any arguable issues as the applicant had not offered security for the grant of orders of stay sought. He further submitted that should the court be inclined to grant stay then the applicant should be ordered to deposit the decretal sum and interest so far incurred and the costs as assessed in an interest earning bank account in the name of the parties' advocates pending the hearing and determination of the appeal.

D. Analysis & Determination

9. This is an application that invokes the discretionary powers of the court that must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal.

10. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. Substantial loss may result to the applicant unless the order was made;
2. The application was made without unreasonable delay; and
3. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

It is important to note that the three (3) prerequisite conditions set out in the said **Order 42 Rule 6 of the Civil Procedure Rules, 2010** cannot be severed. The key word is **“and”** which connotes that all three (3) conditions must be met simultaneously.

11. On the issue of substantial loss, it has been stated that the said loss lies in the inability of the respondent to refund the decretal sum. This was held in **Lucy Nyamu Kimani v Lawrence Mburu Muthiga (2006) eKLR**: –

“An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant.”

The same holding was made in the case of **Antoine Ndiage v African Virtual University (2015) eKLR**.

12. The applicant in this case has not addressed the court on incurring any substantial loss if the orders for stay are not granted. In the Court of Appeal decision in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as followed by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held that:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

13. The failure to address the court on whether he would suffer substantial loss on the basis that the respondent would be unable to pay back the decretal sum the applicant has not established the relevant condition which is a requirement.

14. The second consideration is whether this application was filed in court without unreasonable delay. The judgment was delivered on 26/09/2018 and this application filed on 22/01/2019. A period of three (3) months for filing the present application is in my opinion not too long considering that the certified copies of the proceedings as well as the judgement were provided on the 18th and 19th October 2018. Notably, delay must not only be inordinate, it must also cause prejudice to the opposing party. Having established that there was no delay, I am of the considered view that the respondent will not suffer any prejudice or injustice in the event that the orders for stay are granted.

15. The applicant argues that should an order for security deposit is imposed on him, it would amount to a predetermination of his appeal. I disagree with this argument since each party has a right of hearing before the determination of the appeal. It is the court which determines the security to be deposited that must ensure the due performance of the obligation of the that are incidental thereto. It is therefore sufficient for the applicant to state that he is ready to provide security.

16. In **Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates** Justice Gikonyo the Court stated that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

17. In this case, the decretal amount including costs is approximately Kshs. 1,100,000/= which by any standards is substantial if was to be deposited in full by a party who is aggrieved by the judgment of the court.

18. As this very court held in the case of **Siegfried Busch vs MCSK [2013] eKLR**,

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

19. Having considered all the issues in this application as well as the arguments of the parties, it is my considered view that in the interest of justice, the applicant is entitled to exercise to his right of appeal. The said appeal shall not be rendered nugatory by denying orders for stay to

the applicant.

20. I hereby allow this application on the following terms: -

a) That orders for stay pending appeal are hereby granted.

b) That the applicant within thirty (30) days deposits half of the decretal amount in an interest earning account in the names of the advocates for the parties pending hearing and determination of the appeal and in default, the orders for stay to be automatically vacated.

c) Costs to be in the cause.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nzekele for Okwaro for Respondent

Ms. Kungu for Mugambi Njeru for Appellants